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In The

Supreme Court of the United States

October Term, 1994

ABBOTT LABORATORIES, et al.,

Petitioners,

v.

F. DAVID SEINFELD, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), implicitly overrule *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and the long line of decisions recognizing that a case may "arise under" federal law when a plaintiff's right to relief under state law depends upon the resolution of a disputed question of federal law?

Does a state-law action predicated on violation of a federal statute "arise under" federal law for purposes of 28 U.S.C. §§ 1331 and 1441(b) *only* when the specific plaintiff could bring a private federal cause of action against the defendant under that statute?

PARTIES TO THE PROCEEDING

Petitioners Abbott Laboratories, K. Frank Austen, Duane L. Burnham, Thomas R. Hodgson, H. Laurance Fuller, Sir Bernard J. Hayhoe, Lael F. Johnson, David A. Jones, Boone Powell, Jr., Addison Barry Rand, W. Ann Reynolds, William D. Smithburg, John R. Walter, and William L. Weiss were appellees below. Respondents Steven Robinson, Joseph Seplow, Beth Margolis, and F. David Seinfeld were appellants below.

Pursuant to this Court's Rule 29.1, petitioner Abbott Laboratories notes that it has no parent, subsidiary, or affiliated company that has issued shares or debt securities to the public.

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Abbott Laboratories, K. Frank Austen, Duane L. Burnham, Thomas R. Hodgson, H. Laurance Fuller, Sir Bernard J. Hayhoe, Lael F. Johnson, David A. Jones, Boone Powell, Jr., Addison Barry Rand, W. Ann Reynolds, William D. Smithburg, John R. Walter, and William L. Weiss respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit ordering the District Court to remand this action to state court for lack of federal-question jurisdiction.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 39 F.3d 761 (1994), and is reprinted at Appendix ("App.") 1-7.

The District Court's unreported decision denying respondents' motion to remand to state court is reprinted at App. 9-11.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 7, 1994. Abbott Laboratories filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc, which was denied on December 19, 1994. App. 8. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

28 U.S.C. § 1331 Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441(b) Actions removable generally

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

STATEMENT OF THE CASE

Over the past several years, petitioner Abbott Laboratories has been named as a defendant in a number of suits alleging violations of federal antitrust law in connection with Abbott's infant formula business. In the spring of 1993, Abbott settled one group of consolidated federal antitrust actions alleging price-fixing and bid-rigging in the infant-formula market. Immediately after this settlement was announced, four Abbott shareholders – respondents Steven Robinson, Joseph Seplow, Beth Margolis, and F. David Seinfeld – filed separate derivative actions, purportedly on

Abbott's behalf, against the corporation's directors and officers in the Circuit Court for Cook County, Illinois, seeking to hold them liable for the amount paid in settlement.

Although respondents' complaints were ostensibly grounded in Illinois corporate law, each was based upon the conduct charged in the underlying federal antitrust actions and each relied upon alleged violations of the antitrust laws to establish their state-law claims for breach of fiduciary duty. Thus, for example:

- The *Robinson* complaint alleged that the 1993 settlement of the consolidated federal suits was caused by "Abbott's failure to cease violation of Federal Anti-Trust laws." App. 32. The complaint alleged that the corporation's directors and officers breached their fiduciary duties "by allowing themselves to get involved in price-fixing and bid-rigging." *Id.* at 33.
- The *Seplow* complaint alleged that Abbott had violated the antitrust laws by agreeing with other competitors "to bar competition in the production of baby formulas and to rig bids for the supplying of such products to various state institutions." App. 39. According to Seplow, the corporation's directors and officers breached their fiduciary duties because they "directly acquiesced, condoned, and authorized the aforesaid illegal conduct." *Id.* at 40.
- The *Margolis* complaint alleged that "Abbott's corporate officers and directors breached their fiduciary duties to Abbott by engaging in a price-fixing scheme in its infant formula business," App. 43-44, by causing Abbott to violate federal laws, *id.* at 44, and by failing "to prevent or effectively stop the Company's price fixing activities," *id.* at 50.
- The *Seinfeld* complaint alleged that Abbott had engaged in "overt attempts to restrain competition in violation of antitrust laws," App. 24, and that the corporation's officers and directors

> breached their fiduciary duties by failing to prevent "rampant illegal price-fixing activity in connection with Abbott's baby formula business," *id.* at 26.

Petitioners removed the cases to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1441(b).[1] After the cases were consolidated, respondents moved to have them remanded to state court, asserting that the actions did not "arise under" federal law. The district court denied respondents' motion, holding that the cases did arise under federal law because "the success of plaintiffs' breach of fiduciary duty claims *will depend on* the application of federal antitrust law to the conduct alleged in the complaints." App. 11 (emphasis added) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)).

Following the denial of their remand motion, respondents filed a consolidated amended complaint. Petitioners moved to dismiss this new complaint under Rule 23.1 of the Federal Rules of Civil Procedure because respondents had failed either to make a demand upon Abbott's board of directors prior to filing suit or to allege grounds sufficient to excuse such a demand. On January 31, 1994, the district court ruled that the consolidated amended complaint failed to allege with the particularity required by Rule 23.1 facts sufficient to excuse demand on Abbott's board and dismissed the complaint with prejudice. App. 12-16. Respondents appealed from the decisions denying their motion for remand and granting petitioners' motion to dismiss.

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[1] Under the longstanding "well-pleaded complaint" rule, a defendant may remove an action to federal court where the plaintiff's well-pleaded complaint would permit federal-court jurisdiction in the first instance. *See, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Determining whether removal is proper under § 1441(b), thus, turns on whether the allegations set forth in the state-court complaint "arise under" federal law within the meaning of the general federal-question statute, 28 U.S.C. § 1331.

The Seventh Circuit reversed, holding that the district court lacked subject matter jurisdiction over the case. App. 1-7. While ratifying the district court's conclusion that "[respondents'] complaint alleges a state law claim for breach of fiduciary duty that is *predicated on alleged violation of federal antitrust laws*," *id.* at 3 (emphasis added), the court of appeals held that the case did not "arise under" the federal antitrust laws because those laws did not "grant *these plaintiffs* a private right of action," *id.* at 6-7 (emphasis added). Although the federal antitrust laws do create private rights of action enforceable in federal courts, the Seventh Circuit interpreted this Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), to stand for the proposition that the federal-law issues raised by the complaints could not be deemed "substantial" because respondents lacked standing to bring such private actions in federal court.[2] App. at 5-6 & n.2.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that the Court should grant review for the following three reasons.

First, the decision below is inconsistent with *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and a long line of this Court's precedents holding that a case "arises under" federal law if plaintiff's right to relief under state law depends on the resolution of a substantial and disputed question of federal law. In concluding that the district court lacked jurisdiction even though respondents' claims were "predicated on defendants' alleged violation of federal antitrust laws," the Seventh Circuit relied on an overbroad and untenable reading of this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

Second, the decision below exacerbates an existing split among the circuits over the proper scope of "arising under"

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[2] As a result of its ruling on the jurisdictional question, the Seventh Circuit did not address the district court's dismissal of respondents' consolidated amended complaint on the merits.

jurisdiction after *Merrell Dow*. For nearly ten years, the lower courts have struggled over how to read *Merrell Dow*. The increasingly divergent interpretations of that decision among the courts of appeals are irreconcilable, and can only be resolved by this Court. The courts of appeals disagree not only on the meaning of *Merrell Dow* generally, but also on the narrower question whether a state-law claim "arises under" federal law when it turns on application of a federal statute that expressly creates a private right of action, but under which the particular plaintiff arguably has no viable claim.

Third, the jurisdictional issue presented by this case is an important one. The result of the lower courts' conflicting interpretations of *Merrell Dow* has been substantial confusion among courts and litigants over when a state-law claim is subject to removal under 28 U.S.C. § 1441(b). Resolution of this conflict is important to the consistent allocation of jurisdiction between the state and federal courts because the phrase "arises under" controls jurisdiction under both the general federal-question provision and numerous other specific jurisdictional provisions of the Judiciary Code.

I. THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE SCOPE OF "ARISING UNDER" JURISDICTION.

Since the enactment of the Judiciary Act of 1875,[3] which gave the federal courts jurisdiction over cases "arising under" federal law, this Court has repeatedly construed the Act to encompass cases in which the plaintiff's right to recovery depends on the construction or application of federal law. *See, e.g., Railroad Co. v. Mississippi*, 102 U.S. 135, 139-40 (1880); *Starin v. New York*, 115 U.S. 248, 257-58 (1885); *Hopkins v. Walker*, 244 U.S. 486, 489 (1917). Specifically, the Court has recognized that federal-question jurisdiction comprises two distinct categories of cases: (1) those in which federal law creates plaintiff's cause of action and (2) those in

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[3] Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (now codified at 28 U.S.C. § 1331).

which state law creates the cause of action, but adjudication of that state-law claim requires the resolution of a substantial and disputed issue of federal law. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, (1983). Although the "vast majority of cases" fall within the first category, this Court has "often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law." *Id.* at 9.

The best-known and most definitive articulation of the second category of federal-question cases came in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), which held that a state-law cause of action "arises under" federal law where it appears from plaintiff's complaint that "the right to relief depends upon the construction or application of the Constitution or laws of the United States." *Id.* at 199. The Court has consistently reaffirmed this jurisdictional principle in the 74 years since *Smith*. *See, e.g., Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808 (1988); *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 450 (1955) (opinion of Frankfurter, J.). As a unanimous Court reiterated in *Franchise Tax Board*, a case may arise under federal law if plaintiff's complaint establishes "that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."[4] 463 U.S. at 13.

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[4] That is not to say that the mere presence of a federal issue in a state-law cause of action suffices to create federal-question jurisdiction. As the Court emphasized in *Franchise Tax Board*, the question of federal law must be "substantial," 463 U.S. at 13, "in dispute," *id.*, and necessary to the success of plaintiff's state-law claim, *id.* at 9. These criteria echo Justice Cardozo's admonition in *Gully v. First National Bank*, 299 U.S. 109, 117-18 (1936), that a court assessing whether a case "arises under" federal law must distinguish "between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible." The *Smith* category of federal-question jurisdiction is thus limited to cases in which an important federal interest is central to the claim being adjudicated. For example, the requirement that the federal issue be

The jurisdictional rule adopted by the Seventh Circuit eviscerates this second category of federal-question cases by holding that a federal court lacks jurisdiction unless plaintiff has a cause of action created by federal law. The court reached this result by erroneously reading this Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), as effectively overruling the *Smith* line of cases. As demonstrated below, however, *Merrell Dow* is not nearly so radical a departure from settled jurisdictional principles as the court of appeals believed, and the court's decision cannot be squared with this Court's precedents.

A. The Opinion Below Rests On A Misreading Of This Court's Decision In *Merrell Dow Pharmaceuticals v. Thompson*.

The opinion below rests on an overbroad and untenable reading of this Court's decision in *Merrell Dow*. The plaintiff in *Merrell Dow* asserted a state-law negligence action based in part on a manufacturer's alleged violation of standards set forth in the federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq*. In assessing whether the federal interest at stake was sufficiently "substantial" to confer "arising under" jurisdiction, the *Merrell Dow* Court focused on the parties' concession that Congress had not created *any* private right of action to enforce that federal statute. The absence of such a right of action, the Court declared, was "tantamount" to a congressional determination that there was no "substantial" federal interest in extending federal-court jurisdiction over a cause of action predicated on that particular statute. *Id.* at 814.

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disputed winnows out many cases in which an important issue of federal law has already been decided in a prior case, and thus need not be adjudicated by the state court. *See, e.g., Berg v. Leason*, 32 F.3d 422, 425 (9th Cir. 1994) (federal RICO and securities law issues determined in prior action); *Napoleon Hardwoods, Inc. v. Professionally Designed Benefits, Inc.*, 984 F.2d 821, 822 (7th Cir. 1993) (liability under COBRA not disputed because decided in prior suit).

The court below interpreted *Merrell Dow* to lay down a rigid rule that a state-law cause of action can never "arise under" federal law unless (1) the federal statute at issue creates a private right of action and (2) the *particular plaintiff* in the case has a cause of action under the statute. Thus, while acknowledging that respondents' state-law claims were "predicated on defendants' alleged violation of federal antitrust laws," App. 3, the court below held that those claims did not "arise under" federal law for one reason: *respondents lacked standing to bring an independent federal antitrust action against Abbott. Id.* at 5-7.

But *Merrell Dow* did not hold that existence of a private federal remedy for violating a federal statute is a prerequisite for all cases coming within the *Smith* category of federal-question jurisdiction. To the contrary, *Merrell Dow* reaffirmed the traditional view that the scope of "arising under" jurisdiction involves "sensitive judgments about congressional intent, judicial power, and the federal system." 478 U.S. at 810. These judgments, the Court emphasized, must take into account "the nature of the federal interest at stake," *id.* at 814 n.12, and must be made " 'with an eye to practicality and necessity'," *id.* at 810 (quoting *Franchise Tax Board*, 463 U.S. at 20).

Moreover, *Merrell Dow* did not hold that where Congress *has* created a private right of action under a federal statute, federal-question jurisdiction depends on whether the plaintiff in a particular case has a viable cause of action under the statute. The Court never addressed this issue. The basis for the Court's holding in *Merrell Dow* was that a state-law negligence claim involving standards dictated by the Food, Drug and Cosmetic Act should not be removed to federal court when Congress had not intended *any* claims under that federal statute to be litigated in federal court in the first place. 489 U.S. at 814. The focus of *Merrell Dow* thus was on the category of cases that Congress intended to be heard by the

federal courts and on the federal issue at stake, not on the standing of a particular plaintiff to enforce that claim.[5]

Where, as here, the federal statute at issue creates private rights of action, a state court's adjudication of a violation of the statute may have far-reaching consequences in federal-court cases predicated on that federal statute. Defining "arising under" jurisdiction by reference to a particular plaintiff's standing thus negates the central function of the second category of federal-question jurisdiction: to ensure that the federal courts remain open to disputes that are primarily federal in nature and raise significant federal-law issues.

This case illustrates the point. Respondents' state-law claims derive from the central premise that Abbott engaged in an illegal antitrust conspiracy in its infant formula business. But Abbott has neither admitted nor ever been adjudicated to have engaged in such an illegal conspiracy. Resolution of respondents' claims, therefore, will necessarily involve the court's application of federal antitrust law to the facts alleged in the complaint to determine the threshold issue of whether Abbott has violated federal antitrust law. In order to prove that Abbott's directors failed to "cease violation of Federal Anti-Trust laws" and closed their eyes to "rampant illegal

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[5] Questions of individual standing are often complex and fact-intensive, especially in antitrust cases. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-38 (1983). By making jurisdiction turn on such determinations of standing, the Seventh Circuit's decision is inconsistent with *Bell v. Hood*, 327 U.S. 678, 682 (1946), in which the Court held that jurisdiction over claims allegedly created by federal law should not be determined on the basis of whether plaintiff has stated a cause of action under the federal statute at issue. Even the dissenting justices in *Bell* agreed with the majority that, when a federal statute "affords a remedy which may in some circumstances be availed of by a plaintiff," federal jurisdiction will not be defeated where "[plaintiff's] pleading does not bring him within that class as one entitled to the remedy." *Id.* at 685 (Stone, J., dissenting). Similarly, given the category of federal-question cases established by the *Smith* line of cases, a particular case should not be dismissed for lack of jurisdiction on the ground that the plaintiff in that case has no standing.

price-fixing," respondents would first have to prove that such violations occurred and that such "illegal" conduct was in fact rampant.

Since Abbott is a defendant in ongoing federal-court litigation seeking damages under the federal antitrust laws for some of the same conduct alleged in respondents' complaints, state-court adjudication of respondents' claims threatens to usurp the ability of the federal court to resolve these issues.[6] Federal-court jurisdiction over federal antitrust law is exclusive; Congress ousted the state courts altogether. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). It would be truly anomalous to relegate adjudication of federal antitrust issues to state courts – the courts Congress stripped of jurisdiction – because the issues were raised in a state-law complaint by plaintiffs who were not entitled to raise them in the forum Congress did choose – the federal courts.[7]

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[6] For example, Abbott is a defendant in *Nestle Food Co. v. Abbott Laboratories*, No. CV 93-3218 JDG (RJGx), pending in the U.S. District Court for the Central District of California, alleging violations of the Sherman Act in connection with Abbott's infant formula business in the United States.

[7] Although federal antitrust law falls within the exclusive jurisdiction of the federal courts, a federal court may still be required to give full faith and credit to relevant state-court judgments. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). State-court interpretations of federal antitrust law, thus, may be given preclusive force in subsequent federal-court antitrust actions, undermining the certainty necessary for parties regulated by the federal antitrust laws. *See* Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 Va. L. Rev. 1769, 1792 (1992).

B. The Opinion Below Effectively Negates The Second Category Of Federal-Question Jurisdiction And Thus Conflicts With This Court's Precedents.

The Court's decision in *Merrell Dow* did not purport to overrule *Smith v. Kansas City Title & Trust* or the well-settled jurisdictional principle it exemplifies. *See* 478 U.S. at 809 n.5 (describing *Smith* with apparent approval); *see also id.* at 820 (Brennan, J., dissenting) (noting that "[t]he continuing vitality of *Smith* is beyond challenge"). In cases decided after *Merrell Dow*, the Court has continued to cite with approval the two categories of "arising under" jurisdiction set forth in *Franchise Tax Board*. *See, e.g., Christianson v. Colt Industries Operation Corp.*, 486 U.S. 800, 808 (1988) (federal-question jurisdiction extends over cases in which the complaint "establishes *either* that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law") (quoting *Franchise Tax Board*, 463 U.S. at 27-28; emphasis added); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (approving the "jurisdictional framework governing removal of federal-question cases" described in *Franchise Tax Board*).

The Seventh Circuit's interpretation of *Merrell Dow*, however, effectively eliminates the *Smith* category of federal-question cases. Under the Seventh Circuit's approach, a state-law cause of action can "arise under" federal law *only* when federal law creates a private cause of action that a particular plaintiff decides to forego. If federal-question jurisdiction exists only when the federal statute creates a right of action for the plaintiff who has filed suit, the second category of cases described in *Franchise Tax Board* will effectively collapse into the first. In short, the jurisdictional rule adopted by the court below would eviscerate this Court's continuing recognition of federal-question jurisdiction when federal law does not create the right of action, but a substantial, disputed question of federal law is a necessary element of plaintiff's claim.

Merrell Dow, as noted above, did not go that far, and the Seventh Circuit's aggressive interpretation of the case ignores this Court's oft-repeated insistence that it is "loathe to repudiate" longstanding and settled jurisdictional rules. *American National Red Cross v. S.G. & A.E.*, 112 S. Ct. 2465, 2476 (1992). If the venerable *Smith* line of cases is to be overruled at this late date, that is a matter for Congress, not the courts. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). And if the *Smith* line is to be extinguished by judicial decision, it should be overruled expressly by a decision of this Court, not by a lower court's expansive interpretation of this Court's narrower holding in *Merrell Dow*. *Cf. Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (lower courts not entitled to overrule this Court's cases).

II. THE OPINION BELOW EXACERBATES A CIRCUIT SPLIT ON THE SCOPE OF "ARISING UNDER" JURISDICTION.

The courts of appeals are in substantial disarray in their interpretation of *Merrell Dow* and its effect on the second category of federal question cases. As Judge Silberman has noted: "It is by no means clear how far *Merrell Dow* cuts back on the well-pleaded state claim doctrine." *Rogers v. Platt*, 814 F.2d 683, 688 n.4 (D.C. Cir. 1987). One leading commentator has observed "there can be little doubt that *Merrell Dow* has led to . . . uncertainty in the shaping of federal question jurisdiction." Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 Va. L. Rev. 1769, 1794 (1992).[8] This uncertainty shows no signs of abating, as

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[8] Other courts and commentators have made similar observations about the confusion engendered by *Merrell Dow*. *See, e.g., Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148, 150 (4th Cir. 1994) (decisions in this area "muddled") (citation omitted); E. Chemerinsky, *Federal Jurisdiction*, 273-74 (2d ed. 1994) (after *Merrell Dow*, federal-question jurisdiction exists over state-law claim if federal law that creates a

evidenced by decisions of several circuits within the past two years espousing dramatically different readings of *Merrell Dow*.

Some appellate courts have read *Merrell Dow* as creating a rigid rule that a case cannot "arise under" federal law where it is clear that the relevant federal statute creates no private right of action. *See, e.g., Smith v. Industrial Valley Title Ins. Co.*, 957 F.2d 90, 93 (3d Cir.), *cert. denied*, 112 S. Ct. 3034 (1992) ("Following *Merrell Dow*, we hold that a private federal remedy for violating a federal statute is a prerequisite for finding federal question jurisdiction."); *Nashoba Communications Ltd. Ptshp. No. 7 v. Town of Danvers*, 893 F.2d 435, 438-39 (1st Cir. 1990) (absence of any private federal cause of action "makes the federal issue insubstantial"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1168-69 (5th Cir. 1988) (same); *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1283 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987) (same). In each of these cases, the court rejected jurisdiction because the federal law at issue provided no private right of action for anyone in federal court.

Other courts have refused to read *Merrell Dow* as establishing a mechanical rule for determining federal-question jurisdiction even in cases where Congress created no private right of action. For example, in *City of Huntsville v. City of Madison*, 24 F.3d 169, 174 (11th Cir. 1994), the court noted that language in *Merrell Dow* "could be read as a bright-line rule establishing that federal courts simply should not exercise federal question jurisdiction where a federal statute without a private remedy is incorporated in a state cause of action." The court rejected that reading, however, because it

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cause of action is essential component of plaintiff's claim; "[u]ntil the Court provides additional clarification a more precise statement is impossible"); M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 102 & n.130 (2d ed. 1990) (noting that conflicting interpretations of *Merrell Dow* have "left federal question jurisdiction in an unfortunate state of confusion").

would "eviscerate *Franchise Tax Board*'s continuing recognition of federal question jurisdiction when a substantial, disputed question of federal law is a necessary element of a state claim." *Id.* The court stated it was "unwilling to read *Merrell Dow* so broadly as to do what the Supreme Court did not expressly do." *Id.*

The Second Circuit has similarly concluded that *Merrell Dow* did not eliminate *Smith*-type jurisdiction in all cases where the federal statute creates no private right of action. *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir.), *cert. denied*, 484 U.S. 850 (1987). In the Second Circuit's view, *Merrell Dow* merely reaffirmed the traditional rule that federal-question jurisdiction was inappropriate where "the federal statute was merely incorporated by reference as a standard of conduct in a state negligence action."[9] *Id.* at 196. Where, in contrast, a federal statutory issue is "decisive" to a plaintiff's case, federal-question jurisdiction may be appropriate *regardless* of the existence of a private federal right of action. *Id. See also Platzer v. Sloan-Kettering Institute for Cancer Research*, 787 F. Supp. 360, 366 (S.D.N.Y.), *aff'd mem.*, 983 F.2d 1086 (Fed. Cir. 1992), *cert. denied*. 113 S. Ct. 1648 (1993) (where federal issue is "sufficiently substantial," federal question jurisdiction may exist "even where no private right of action exists for the underlying federal issue"); *Milan Express Co. v. Western Surety Co.*, 886 F.2d 783, 788-89 (6th Cir. 1989) (upholding "arising under" jurisdiction despite lack of private

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[9] A similar analysis of *Merrell Dow* is implicit in *Rogers v. Platt*, 814 F.2d 683 (D.C. Cir. 1987). In a concurring opinion, a majority of the panel stated that "*Merrell Dow* merely confirms that if a federal statute raises no federal cause of action anywhere (i.e., either in federal or state court) *and* only an insubstantial federal question as part of a state-based claim," there is no federal-question jurisdiction. *Id.* at 696 (Edwards, J., concurring) (emphasis added).

federal cause of action, citing "specific and compelling federal interest").[10]

The Seventh and Fourth Circuits, in sharp contrast, have held that even where a state-law claim turns on application of a federal statute that creates a right of action, *Smith*-type jurisdiction does not exist unless the plaintiff also has a viable cause of action under that statute. Thus, the opinion below held that "the plaintiff must be the one authorized by the statute to sue in federal court". *See* App. 6 n.3. The Fourth Circuit adopted an even more extreme extension of *Merrell Dow* in *Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148 (4th Cir. 1994). Even though plaintiff's state-law claim turned on application of federal environmental statutes creating private rights of action that the plaintiff had standing to assert, the court held that the case was improperly removed to federal court because plaintiff would have been procedurally or substantively barred from asserting his claims under the federal statutes. *Id.* at 150, 152-53.[11] "Because the

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[10] Even in those circuits that have construed *Merrell Dow* as establishing a bright-line rule, some judges have taken different views. *See Smith v. Industrial Valley Title Ins. Co.*, 957 F.2d at 95 (Cowen, J., dissenting) ("only way to reconcile *Merrell Dow* with *Smith* and *Franchise Tax Board* is to hold that federal jurisdiction can exist in the absence of a private federal remedy when a substantial federal question is involved").

[11] Decisions of district courts remanding cases to state court, and thus evading all appellate review, have reached similar conclusions. *See, e.g., Polcha v. AT&T Nassau Metals Corp.*, 837 F. Supp. 94, 96-97 (M.D. Pa. 1993) (relying on *Merrell Dow* and holding that state-law case did not "arise under" federal statutes, even though statutes created private right of action, because particular form of relief sought under state law was not available under federal statutes); *Pike v. Edgar*, 801 F. Supp. 907, 912 (D.N.H. 1992) (relying on *Merrell Dow* to remand because allegations of violation of federal securities law embedded in state-law claim failed to satisfy scienter requirement for viable Rule 10b-5 cause of action); *Mid America Title Co. v. Chicago Title Ins. Co.*, 1989 WL 39780 (N.D. Ill.) (relying on *Merrell Dow* to remand because federal statute forming basis of plaintiff's state-law claim created private right of action, but not for plaintiff in that case).

Plaintiffs could not proceed under any of these environmental statutes, and because the remedy sought is unavailable here, a 'private cause of action' under *Merrell Dow* does not, in truth, exist." *Id.* at 152-53.

These inconsistent interpretations of *Merrell Dow* have created intolerable confusion over when state-law claims raising disputed issues of federal law may be removed to federal court. The practical difficulty for both litigants and the district courts is exemplified by the conflicting decisions on the specific question whether a federal court has removal jurisdiction over a state-law claim predicated on violation of a federal statute that creates a private right of action, where the plaintiff who sued in state court arguably has no right to bring that action under the federal statute. The Court did not address this issue in *Merrell Dow*, where the parties had conceded that the relevant federal statute created no private right of action. 478 U.S. at 810. On this narrower question, the decision below and that of the Fourth Circuit in *Mulcahey* are in conflict with the decision of the Federal Circuit in *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 986 F.2d 476 (Fed. Cir. 1993).

In *Additive Controls*, plaintiff brought a state-law claim for business disparagement based on defendant's accusations of patent infringement. 986 F.2d at 478. Because the plaintiff did not own the patent at issue, federal patent law did not create its right of action. *Id.* Relying on *Smith v. Kansas City Title & Trust*, the court nonetheless found that plaintiff's claim "arose under" federal patent law because its right to relief "necessarily depends on resolution of a substantial question of patent law, in that proof relating to patent infringement is a necessary element of [plaintiff's] business disparagement claim." *Id.* at 478-79. The plaintiff's lack of standing to bring a federal claim under the patent laws, in other words, in no way precluded it from raising a "substantial" federal question via its state-law business disparagement claim.[12]

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[12] The Court in *Additive Controls* was construing the term "arises under" federal patent law for purposes of 28 U.S.C. § 1338. In

The conflict between *Additive Controls* and the opinion below highlights the conceptual differences underlying the varying interpretations of *Merrell Dow*: some courts focus narrowly on the availability of a particular party's federal remedy while others focus more broadly on the nature of the claim being adjudicated and the federal interests at stake. Like the federal antitrust laws at issue in this case, moreover, the federal patent laws at issue in *Additive Controls* provided for *exclusive* federal-court jurisdiction. In this context, it is impossible to deny that Congress intended to provide a federal forum to adjudicate these important federal issues. The issues remain important federal issues, of course, even when raised in a state-law claim.

In sum, there is substantial, and growing, confusion among the lower courts over how to apply *Merrell Dow*. The interpretations of *Merrell Dow* adopted by the Second, Sixth, Eleventh and Federal Circuits are irreconcilable with those of the First, Third, Fourth, Fifth, Seventh, and Ninth Circuits. Moreover, these decisions do not reflect the full extent of the conflict among the lower courts in cases removed from state court. Because a district court's decision to remand a case to state court for lack of subject matter jurisdiction ordinarily is "not reviewable on appeal or otherwise," 28 U.S.C. § 1447(d), many conflicting district court decisions never reach the courts of appeals. The resulting confusion over the scope of "arising under" jurisdiction has "surely [led] to both a waste of judicial time and added expense to the litigants."

Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 808-09 (1988), the Court quoted *Franchise Tax Board* and stated that "[l]inguistic consistency" demanded that jurisdiction under section 1338 similarly extend to cases in which "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law." The Federal Circuit would clearly view the issue the same way under *Merrell Dow*. Just a year before *Additive Controls*, that court affirmed the decision in *Platzer v. Sloan-Kettering Institute*, 787 F. Supp. 360, 366 (S.D.N.Y.), *aff'd mem.*, 983 F.2d 1086 (Fed. Cir. 1992), in which the district court analyzed *Merrell Dow* extensively and upheld federal question jurisdiction where plaintiff had no private right of action under the statute at issue.

Redish, *Reassessing the Allocation of Judicial Business*, 78 Va. L. Rev. at 1794.

III. THE QUESTION PRESENTED IS IMPORTANT TO THE PROPER ALLOCATION OF JURISDICTION BETWEEN THE STATE AND FEDERAL COURTS.

The *Smith* category of cases has a limited, but important, role to play in the jurisdictional scheme. It ensures that significant federal questions will have a federal forum even though they may be raised only via a state-law claim. *See* Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine after Merrell Dow*, 52 Ohio St. L. J. 1477, 1559-60 (1991). This is especially important where, as in this case, plaintiff's state-law claim raises questions of federal law entrusted to the *exclusive* jurisdiction of the federal courts. If this case is remanded to state court, plaintiffs cannot prevail unless the court determines that Abbott and its officers and directors have engaged in a price-fixing conspiracy in violation of federal antitrust law – precisely the kind of determination Congress and this Court have determined should be made by a federal court.

The proper and consistent construction of the term "arising under" has far-reaching implications for the allocation of state and federal jurisdiction. In addition to the broad category of cases governed by section 1331, that term governs original jurisdiction, and thus also removal jurisdiction, under numerous other jurisdictional provisions. *See, e.g.*, 28 U.S.C. § 1334 (cases "arising under" bankruptcy law); *id.* § 1337 (cases "arising under" acts of Congress regulating commerce); *id.* § 1338 (cases "arising under" acts of Congress relating to patents, copyrights and trademarks); *id.* § 1340 (cases "arising under" various revenue laws). As this Court has stated before, the phrase "arising under" should be construed consistently for the various jurisdictional provisions in which it appears. *See Christianson*, 486 U.S. at 808-09 (construing § 1338); *Franchise Tax Board*, 463 U.S. at 8 n.7 (same standard of "arising under" applies to § 1337).

Finally, reversal of the jurisdictional rule adopted by the Seventh and Fourth Circuits will minimize wasteful threshold litigation over jurisdiction. As Justice Scalia has observed, "Nothing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (dissenting opinion). The rule applied by the Seventh and Fourth Circuits, however, will produce just such wasteful litigation by adding a complex new layer of inquiry to the determination of subject matter jurisdiction. If a federal statute creates private rights of action and jurisdiction turns on whether the named plaintiff has a viable cause of action under that statute, determining the existence of federal jurisdiction will often involve time-consuming threshold inquiries into the merits of a federal claim imbedded in a state-law cause of action.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

BEST AVAILABLE COPY

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-1507
F. DAVID SEINFELD, LEATRICE SEINFELD,
FREDERICK SEINFELD, et al.,

Plaintiffs-Appellants,

v.

K. FRANK AUSTEN, DUANE L. BURNHAM,
H. LAURANCE FULLER, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 93 C 3788, 93 C 3825, 93 C 3826, 93 C 3827 –
Charles P. Kocoras, *Judge.*

ARGUED SEPTEMBER 19, 1994 – DECIDED NOVEMBER 7, 1994

BEFORE BAUER and MANION, *Circuit Judges,* and GRANT,* *District Judge.*

MANION, *Circuit Judge.* Plaintiffs below, individual shareholders of Abbott Laboratories, Inc. ("Abbott" or "the corporation"), appeal the denial of their motion to remand this case to state court and also appeal the district court's subsequent

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* Hon. Robert A. Grant, District Judge for the Northern District of Indiana, is sitting by designation.

dismissal of their complaint against Abbott's Board of Directors for breach of fiduciary duty. We conclude that the district court lacked federal question jurisdiction to remove this case to federal court and therefore reverse with instructions to remand this action to state court.

I. Background

This is a consolidated shareholders derivative suit originally filed in state court. The plaintiffs, F. David Seinfeld (including Leatrice and Frederick Seinfeld), Joseph Seplow, Steven Robinson, and Beth Margolis, each filed separate actions in the Circuit Court of Cook County, Illinois alleging that the defendants, Abbott's Board of Directors, breached their fiduciary duty to the corporation by failing to properly monitor Abbott's most senior executives and prevent them from engaging in violations of federal antitrust laws. Specifically, plaintiffs allege that defendants' failure to supervise management caused the corporation to lose $140 million, the amount that the corporation paid to settle several alleged antitrust claims. Defendants removed these actions to federal district court. The plaintiffs moved to remand the proceedings to state court for lack of removal jurisdiction. The district court denied the motion and, with the agreement of the parties, consolidated the actions. Plaintiffs amended their complaint to reflect the consolidation and moved again to remand the proceedings to state court. This motion too was denied. Defendants then moved to dismiss plaintiffs' complaint for failure to make a "demand" upon the directors prior to filing suit, as required by Fed. R. Civ. P. 23.1. The district court agreed and dismissed plaintiffs' complaint.

On appeal, plaintiffs contend, among other things, that the district court did not have jurisdiction over this action and therefore erred in denying their motion to remand these proceedings to state court.

II. Analysis

Plaintiffs argue that the district court erred in removing their claims from state court because they could not have brought their state law actions in federal court in the first instance. The propriety of removal of a state action to federal court is a question of federal jurisdiction and is subject to *de novo* review. *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401 (9th Cir. 1991).

Under 28 U.S.C. § 1441(a), removal of a state civil action to federal court is proper where "the district courts of the United States have original jurisdiction." The district court's original jurisdiction extends to "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), the Supreme Court held that absent diversity of citizenship, federal question jurisdiction is required. "Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Id.* Since diversity of citizenship is not alleged here, "the propriety of the removal . . . turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

In this case, plaintiffs' complaint[1] alleges a state law claim for breach of fiduciary duty that is predicated on defendants' alleged violation of federal antitrust laws. The question is whether this complaint states a cause of action that "arises under" federal law. Defendants argue that it does, citing the Supreme Court in *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983):

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[1] The question of whether a claim "arises under" federal law must be determined by reference to the plaintiff's well-pleaded complaint. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

> Even though state law creates [a party's] causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

Defendants urge that this language creates federal jurisdiction over state claims, like the one presented here, "without regard to whether Congress intended a federal cause of action." *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987). As long as plaintiffs' complaint raises a substantial federal question in their state created cause of action, defendants contend that it is not necessary that the underlying federal law create a federal private right of action in favor of plaintiffs.

Franchise Tax, however, is not the final word on the matter. The passage from *Franchise Tax* cited above, and others like it, was interpreted by the Court in *Merrell Dow*. In that case, the Supreme Court specifically clarified this language and noted that *Franchise Tax* "did not purport to disturb the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* at 813. The court then defined the intent of this language as follows:

> [T]he congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction. . . . We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'

Id. at 814, 817. Under *Merrell Dow*, therefore, "if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question." *Utley v. Varian Assoc., Inc.*, 811 F.2d 1279, 1283 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987); *see also Rogers*, 814 F.2d at 688 (it is unnecessary for federal courts to consider whether a substantial federal question is a necessary element of a state cause of action "because congressional intent not to create a federal cause of action is deemed a proxy for the ultimate question whether or not Congress intended to confer federal jurisdiction."); *accord Smith v. Industrial Valley Title Ins. Co.*, 957 F.2d 90, 93 (3d Cir.), *cert. denied*, 112 S.Ct. 3034 (1992); *Nashoba Communications Ltd. Partnership No. 7 v. Town of Danvers*, 893 F.2d 435, 438-39 (1st Cir. 1990); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1168-69 (5th Cir. 1988).[2] As this court stated in *Dillon v. Combs*, 895 F.2d 1175, 1177 (7th Cir. 1990), *cert. denied*, 498 U.S. 1023 (1991), "[a] federal rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce that rule."

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[2] Defendants cite this court's decision in *Napoleon Hardwoods Inc. v. Professionally Designed Benefits, Inc.*, 984 F.2d 821, 822 (7th Cir. 1993), in support of their argument that federal question jurisdiction exists where a substantial, disputed question of federal law is an element of plaintiffs' state law claim. As noted above, however, *Merrell Dow* interpreted the word "substantial" in this phrase to mean a congressional choice to include a private right of action in favor of plaintiffs. *Merrell Dow*, 478 U.S. at 814. Subsequent to *Merrell Dow* this and other phrases taken from *Franchise Tax* (including its progeny and precursors) must be similarly interpreted. *But see West 14th Street Commercial Corp. v. 5 West 14th Street Owners Corp.*, 815 F.2d 188, 194 (2d Cir.)., *cert. denied*, 484 U.S. 871 (1987) (indicating that even if plaintiffs had no express right of action under the statute, their state claims encompassed a substantial federal question and therefore still presented a federal question sufficient under 28 U.S.C. § 1331).

Turning to plaintiffs' complaint, we must determine whether the antitrust laws, the violation of which plaintiffs allege as the basis of their state law breach of fiduciary duty claims, grant these plaintiffs a private right of action.[3] We conclude in this case that they do not.

Section 4 of the Clayton Act sets forth the group of persons who may maintain private damages actions under the antitrust laws. This section provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides.

15 U.S.C. § 15. Despite the broad wording of this section, it is well-settled that private plaintiffs, such as here, must prove the existence of an "antitrust injury" before they may recover damages under this section. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *see also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534-35 (1983). Such injury must be attributable to an anticompetitive aspect of the practice under scrutiny and must flow from that which makes the defendants' acts unlawful. *Atlantic Richfield Co.*, 495 U.S. at 334; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In addition, the antitrust laws were designed to protect consumers and competitors in the market

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[3] Defendants argue that federal law need not specifically grant *these* plaintiffs a private right of action as long as *someone* has been granted such a right in the statute. As this court noted in *Dillon*, 895 F.2d at 1177, however, the plaintiff must be the one authorized by the statute to sue in federal court. *Id.* (no federal removal jurisdiction where Congress, in RICO, did not authorize a state to obtain relief on account of a fraud practiced against its residents, but allowed suits by the federal government or by persons injured in their business or property).

in which trade was restrained. *Associated General Contractors*, 459 U.S. at 539.

In this case, the "practice under scrutiny" is the defendants' alleged failure to supervise senior Abbott management and prevent them from engaging in violations of the antitrust laws. While proper supervision in this case may have prevented the anticompetitive activities allegedly engaged in by management, a failure to do so is not itself anticompetive. The corporation's alleged $140 million injury flows from the activities of management, not the inactivity of the Board. In addition, plaintiffs' complaint does not contend that the corporation was injured by any anticompetitive behavior in the market. This is not surprising, for it is the corporation itself, albeit through its management, that is alleged to be the perpetrator of these violations.

Because plaintiffs could not have sued originally in federal court, plaintiffs' state law breach of fiduciary duty claim does not "arise under" federal law. As there is no original federal jurisdiction under 28 U.S.C. § 1331, removal jurisdiction was improperly exercised and the action must be remanded to state court.

III. Conclusion

For the foregoing reasons, we reverse with instructions to grant plaintiffs' motion to remand these proceedings to state court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 19, 1994

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Robert A. Grant, *District Judge**

F. DAVID SEINFELD, et al.,
Plaintiffs-Appellants,

NO. 94-1507

v.

K. FRANK AUSTEN, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 93 C 3788, 93 C 3825, 93 C 3826, 93 C 3827

Charles P. Kocoras,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendants-Appellees, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Hon. Robert A. Grant, District Judge for the Northern District of Indiana, is sitting by designation.

*Hon. Walter J. Cummings took no part in the consideration of this petition for rehearing en banc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ABBOTT LABORATORIES	) 93 C 3788	93 C 3825
DERIVATIVE LITIGATION	) 93 C 3826	93 C 3827

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on plaintiffs' motion to remand this consolidated action to circuit court.[1] For the following reasons, plaintiffs' motion is denied.

These shareholder derivative suits were originally filed in the Circuit Court of Cook County, Illinois. On June 24, 1993, defendant Abbott Laboratories Incorporated ("Abbott") removed the consolidated action to this Court with the consent of the remaining individual defendants.

In support of their present motion for remand, the plaintiffs contend that their breach of fiduciary duty claims are based upon defendant directors' alleged bid-rigging and price-fixing conduct which was violative of federal anti-trust laws and which resulted in the defendants having to expend approximately $140,000,000.00 in out-of-court settlements. Plaintiffs argue on this basis that the complaints' claims and causes of action are grounded in state law, not federal anti-trust law, and thus federal jurisdiction does not exist. Plaintiffs further argue that, even assuming that federal antitrust issues exist in this action, removal is improper because any resolution of antitrust issues will not be dispositive with respect to plaintiffs' state law claims.

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[1] On July 15, 1993, this Court entered an order consolidating the actions entitled *Seinfeld et al. v. Austen, et al.*, 93 C 3788; *Robinson v. Abbott Laboratories, et al.*, 93 C 3825; *Seplow v. Austen, et al.*, 93 C 3826; and *Margolis v. Burnhan, et al.*, 93 C 3827.

In response, defendants point to specific allegations of the complaints before us, arguing thereby that plaintiffs' state law claims are inextricably dependent on a determination of substantial issues of federal antitrust law. In view of the complaints' allegations and the applicable case law, this Court agrees. The defendants properly cite to the Supreme Court's holding in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983), where the Court reiterated the settled rule that a case may "arise under" federal law, and thus support federal question jurisdiction, where vindication of a right under state law turns on the application of federal law:

> Even though state law creates appellant's causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

See also Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co., 747 F. Supp. 1292, 1296 (C.D. Ill. 1990) (upholding removal jurisdiction where state-law complaint alleging violations of Illinois antitrust law was "sufficiently federal in character"); *McElroy v. SOS International, Inc.*, 730 F. Supp. 803, 805 (N.D. Ill. 1989) (upholding removal jurisdiction where allegations in complaint were found sufficient to state a claim for violation of OSHA); *Cannon v. Loyola University of Chicago*, 609 F. Supp. 1010, 1013-14 (N.D. Ill. 1985), *aff'd*, 784 F.2d 777 (7th Cir. 1986) (upholding removal jurisdiction on the basis that "[w]hile the causes of action are apparently grounded in state law, the contract theories will inevitably depend on an interpretation of federal law.").

Here, plaintiffs claims for relief rest in large part on the premise that Abbott engaged in conduct violative of federal antitrust law. For example, in order to prove that the defendant directors failed to "cease violations of Federal Anti-Trust laws," as alleged in the *Seplow* complaint, plaintiffs will first

have to prove that such violations occurred. Likewise, in order to prove that the defendant directors participated in a "price fixing scheme," as alleged in the *Margolis* complaint, plaintiffs will have to prove that the conduct alleged in the complaint constituted price fixing violative of federal law. It follows, therefore, that the success of plaintiffs' breach of fiduciary duty claims will depend on the application of federal antitrust law to the conduct alleged in the complaints. As such, we find the Supreme Court's rationale in *Franchise Tax* directly applicable, *see* 463 U.S. at 13, and we deny the plaintiffs' motion to remand accordingly.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: September 2, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ABBOTT LABORATORIES	)	
DERIVATIVE LITIGATION	)	93 C 3788

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Plaintiffs filed this shareholder derivative suit on behalf of Abbott Laboratories ("Abbott") asserting that Abbott's directors and management breached their fiduciary obligations owed to shareholders and the corporation. Plaintiffs' complaint arises out of the director's alleged involvement in antitrust violations in connection with the marketing and selling of Abbott's infant formula products. The plaintiffs seek to hold the defendants Abbott's entire board of directors liable.

In the motion presently before this Court, the defendants move to dismiss the complaint for Plaintiffs' failure to make a demand upon Abbott's board of directors prior to commencing this derivative suit. The defendants maintain that the plaintiffs have failed to allege, with the particularity required by Federal Rule of Civil Procedure 23.1, facts sufficient to excuse a demand on Abbott's board.

For the reasons set forth below, the defendant directors' motion to dismiss is granted.

LEGAL STANDARD

Federal Rule of Civil Procedure 23.1 requires the plaintiff in a shareholder derivative suit make a demand upon the board of directors for them to take action, or state with particularity why demand is excused. The rule has been described as a "substantive right" that allows the board "an opportunity to rectify an alleged wrong without litigation, and

to control any litigation which does arise." *Aronson v. Lewis*, 473 A.2d 805, 809 (De. 1984). This right to control is a basic component of the board of directors' role in corporate governance. *See Kamen v. Kemper Financial Servs.*, 500 U.S. 90, ___, 111 S. Ct. 1711, 1716 (1991).

Demand will be excused if it would be "futile." The law of the state of incorporation of the subject corporation, here Illinois, controls the question of whether demand would be futile. *See Kamen*, 500 U.S. at ___, 111 S.Ct. at 1719. Illinois courts apply the same two-prong test articulated by the Delaware Supreme Court in *Aronson v. Lewis*, in determining whether demand is futile:

> [a] plaintiff may establish futility of a demand by creating a reasonable doubt that the directors are disinterested and that the challenged transaction was otherwise the product of a valid exercise of the business judgment.

Powell v. Gant, 556 N.E.2d 1241, 1245 (Ill. App.4 Dist. 1990), *app. denied*, 564 N.E.2d 847 (1990) (citing *Aronson*, 473 A.2d at 814). Whether the plaintiff has plead facts sufficient to raise a doubt as to the disinterestedness of the board, or the applicability of the business judgment rule, will be discussed below.

DISCUSSION

The plaintiffs essentially defend against the defendants' motion by claiming that they have sufficiently pled facts indicating that a demand in these circumstances would be futile. Specifically, the plaintiffs claim that Abbott's entire board "knew or should have been aware of, but failed to take adequate steps to prevent or terminate the rampant illegal price-fixing activity in connection with Abbott's baby formula." Plaintiff's Complaint, ¶ 82. The plaintiffs further allege that over the course of a significant period of time,

there were certain "red flags" which should have alerted Abbott's board to the company's alleged illegal price fixing.

Negligent failure to act, however, this is not the type of excuse contemplated by the *Aronson* standard. Under the second prong of the *Aronson* test, demand is excused if the plaintiff alleges particularized facts which create a reasonable doubt that the challenged action was the product of a valid business judgment[1], regardless of the disinterestedness and independence of the directors. *Aronson*, 473 A.2d at 814. The parties spend a considerable amount of time focusing upon the business judgment prong of the *Aronson* test. The facts as pled, however, clearly indicate that the business judgment rule is inapplicable. The business judgment rule "operates only in the context of director action . . . it has no role where the directors have either abdicated their functions, or absent a conscious decision, failed to act." *Aronson*, 473 A.2d at 813. Here, the plaintiffs do not allege that the directors made a conscious decision to act. Rather, the plaintiffs' allegations, at most, accuse the directors of negligence, or mere acquiescence.

Case law, however, clearly indicates that futility is not established by alleging directors' passive acquiescence in the challenged conduct. *Powell v. Gant*, 145 Ill.Dec. 339, 343 (Ill.App.4 Dist. 1990); *see also, In Re E.F. Hutton Banking Practices Litigation*, 634 F.Supp. 265, 272 (S.D.N.Y. 1986) (applying Delaware law). Thus, without specific allegations of self-dealing, personal benefit or bias as to a majority of the board, mere approval and acquiescence are not sufficient to excuse demand as futile. *Shields on Behalf of Sundstrand Corp. v. Erickson*, 710 F.Supp. 686, 692 (N.D.Ill. 1989)

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[1] The business judgment rule is essentially a presumption that the directors make business decisions "on an informed basis, in good faith, and in the honest belief that the action was taken in the best interests of the company." *Aronson*, 473 A.2d at 812; *Fields v. Sax*, 78 Ill. Dec. 864, 870 (Ill.App.1 Dist. 1984).

(applying federal law and Delaware law); *see also Lewis v. Graves*, 701 F.2d 245, 248 (2d Cir. 1983).

The only self-interest that can be gleaned from the allegations is that all of the directors are named as defendants in this suit. However, merely naming all of the board of directors as defendants does not excuse demand as futile. *Powell* 145 Ill. Dec. at 343; *Shields*, 710 F.Supp. at 692. Without particularized allegations regarding director disinterestedness in the underlying transactions, shareholder demand is not excused on the basis that the directors would be called upon to sue themselves in behalf of the corporation. *Shields*, 710 F.Supp at 692; *Cottle v. Hilton Hotels Corp.*, 635 F. Supp. 1094, 1098-99 (N.D. Ill. 1986) (applying Delaware law). Thus, to excuse demand plaintiffs must allege with particularity that the directors would not properly protect the interests of the corporation and the shareholders.

Here, the plaintiffs have failed to sufficiently allege facts casting a doubt as to whether the directors would properly protect the interests of the corporation. Likewise, they have failed to meet the first prong of the *Aronson* test in failing to create a reasonable doubt that the action complained of was conducted by disinterested and independent directors. *Aronson*, 473 A.2d. at 814.

Thus, even assuming that the directors were aware of all or even some of the "red flags" which the plaintiffs listed in paragraph 82 of their complaint, these allegations are not sufficient to excuse demand in this case. Contrary to the guidance of Rule 23, the plaintiffs do not specifically allege facts sufficient to excuse demand. The plaintiffs fail to allege that the directors were not disinterested in the underlying transaction. While the plaintiffs state in ¶ 79 of their complaint that the board of directors "participated" in the alleged wrongful acts, this conclusory allegation is not supported by the facts alleged. Nowhere do they claim self-dealing, personal benefit or bias on the part of a majority of the board of

directors. Moreover, the plaintiffs do not allege that a majority of the director defendants made a conscious decision of inaction. Finally, the plaintiffs' complaint also lacks any allegations that there has been a specific finding of antitrust violations.

Our decision is in accordance with the purpose behind the demand requirement that "the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors or the majority of shareholders." *Kamen*, 500 U.S. at ___, 111 S.Ct. at 1719 (quoting *Daily Income Find, Inc. v. Fox*, 464 U.S. 523, 530 (1984)). Accordingly we will require the plaintiff shareholders to exhaust their corporate remedies. Defendants' motion to dismiss is granted.

CONCLUSION

For the foregoing reasons, Abbott Laboratories' Motion to Dismiss is granted.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: January 31, 1994

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

F. DAVID SEINFELD, LEATRICE SEINFELD and FREDERICK SEINFELD, Plaintiffs, -against- K. FRANK AUSTEN, DUANE L. BURNHAM, H. LAURANCE FULLER, SIR BERNARD HAYHOE, THOMAS R. HODGSON, DAVID A. JONES, BOONE POWELL, JR., ADDISON BARRY RAND, W. ANN REYNOLDS, WILLIAM D. SMITHBURG, JOHN R. WALTER, WILLIAM L. WEISS, Defendants, -and- ABBOTT LABORATORIES, Nominal Defendant.	No. 93CH 04793 VERIFIED COMPLAINT FOR EQUITABLE AND OTHER RELIEF STOCKHOLDERS' DERIVATIVE ACTION

Plaintiffs, by their attorneys, allege upon personal knowledge as to their own acts and upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action as a derivative action on behalf and for the benefit of Abbott Laboratories ("Abbott" or the "Company"). Plaintiffs assert that Abbott's management

breached its fiduciary obligations to Abbott by actively promoting conduct in violation of applicable laws in connection with the marketing and sale of baby formula products and the engaging in document destruction in order to cover-up their wrongful activities. As a result, Abbott has been caused to settle certain antitrust litigation for approximately $140 million while still the subject of various federal and state agency investigations and litigation. As the wrongful conduct involved not only one of the most significant businesses at Abbott representing 14% of the sales and 16% of its profit but also occurred over a long period of time and extended to the Chairman's office, the entire board of Abbott is charged with a failure to fulfill their fundamental fiduciary obligation to protect Abbott from such harm by (i) designing and monitoring adequate controls to insure compliance with applicable laws and regulations; and (2) failing to take steps after actual or constructive notice of such wrongful acts to correct and/or terminate these wrongful practices. Further the entire Board has breached their fiduciary duty by failing to adequately supervise and monitor the conduct of Abbott's most senior executives.

PARTIES

2. Plaintiffs own, and at all relevant times continuously have owned, shares of Abbott common stock.

3. Abbott is a corporation duly organized under the laws of the State of Illinois whose principal executive offices are located at One Abbott Park Road, Abbott Park, Illinois 60064-3500. Abbott is a multi-billion corporation engaged in the development, manufacture, sale and marketing of a broad and diversified line of human health care products and services. As of April 30, 1993 Abbott had approximately 832,000,000 shares of common stock outstanding held by approximately 56,500 stockholders of record. Abbott's stock is listed and actively traded on a variety of national and international securities exchanges, including the New York,

Pacific, Midwest, Tokyo, Zurich and Geneva Stock Exchanges.

4. The following individual defendants (the "director defendants") constitute the entire Board of Directors of Abbott:

Name	Director Since	Position
K. Frank Austen	1983	Member Audit Committee and Nominating Committee
Duane L. Burnham	1985	Chairman of the Board and Chief Executive Officer
Thomas R. Hodgson	1985	President and Chief Operating Officer
H. Laurance Fuller	1988	Member Executive Committee and Compensation Committee
Sir Bernard Hayhoe	1989	Member Audit Committee
David A. Jones	1982	Member Nominating Committee and Compensation Committee
Boone Powell, Jr.	1985	Member Compensation Committee and Nominating Committee
Addison Barry Rand	1992	
W. Ann Reynolds	1980	Member Nominating Committee
William D. Smithburg	1982	Member Nominating Committee and Member Compensation Committee (Chairman)

John R. Walter	1990	Member Executive Committee and Member Audit Committee
William L. Weiss	1984	Member Audit Committee

5. Directors who are not employees of Abbott or its subsidiaries receive $3,750 for each month of service as director ($45,000 per annum) and $625 for each month of service as chairman of a board committee.

6. Upon retirement from the Board, each non-employee director is entitled to receive the monthly director's fee in effect at the time of retirement for the lesser of 120 months or the number of months of service as a non-employee director.

7. The individual director defendants, by reason of their corporate directorships and/or executive positions, stand in a fiduciary position relative to the Company and the Company's shareholders, which fiduciary relationship, at all times relevant herein, required these defendants to exercise their best judgment and to act in a prudent manner and in the best interests of the Company and the Company's shareholders. They were and are required: to use their ability to control and manage the Company in a fair, just and equitable manner; to act in furtherance of the best interests of the Company and its shareholders by refraining from abusing their positions of control; and not to favor their own interests at the expense of the Company and its shareholders. Additionally, each of the director defendants had the affirmative obligation to be informed of the operations of the Company and to have in place adequate procedures to ensure that the Company's employees did not violate the law.

DUTIES AND OBLIGATIONS OF OFFICERS AND DEFENDANTS

8. Each director defendant owed Abbott and its shareholders the duty to exercise due care and diligence in the management and administration of the affairs of Abbott and

in the use and preservation of its property and assets, and owed the duty of full and candid disclosure of all material facts related thereto. Further, Abbott's officers and directors owed a duty to Abbott to ensure that Abbott operated in compliance with all applicable federal and state laws, rules and regulations, that Abbott did not engage in any fraudulent, unsafe or unsound practices, and that Abbott did not waste its corporate assets.

9. To discharge their duties, the director defendants were required to exercise reasonable and prudent supervision over the management, policies, practices, controls and financial affairs of Abbott. By virtue of such duties, and the obligation of ordinary and reasonable care and diligence the director defendants were required, among other things:

(a) To manage, conduct, supervise and direct the business and affairs of Abbott in accordance with federal and state laws, rules and regulations;

(b) To neither violate nor knowingly, recklessly or negligently permit any officer, director or employee of Abbott to violate applicable federal or state laws, rules and regulations and to exercise reasonable control and supervision over such officers and employees;

(c) To ensure the prudence and soundness of policies and practices undertaken or proposed to be undertaken by Abbott and to ensure compliance with generally accepted prudent operating standards;

(d) To remain informed as to how Abbott was, in fact, operating and upon receiving notice or information of any illegal, unsafe, imprudent or unsound practice, to

make a reasonable investigation in connection therewith and to take steps to correct that condition or practice;

(e) To review and supervise major corporate strategies, including (and especially) Abbott's sales and marketing practices concerning its baby formula operations, to ensure that Abbott's business is prudently managed; and

(f) To preserve and enhance Abbott's reputation as befits a public corporation and to maintain public trust and confidence in Abbott as a prudently managed institution fully capable of meeting its duties and obligations.

DERIVATIVE ALLEGATIONS

10. Plaintiffs bring this action as a derivative action on behalf of and for the benefit of Abbott to remedy the individual defendants' wrongdoing alleged herein.

11. Plaintiffs will fairly and adequately represent the interests of Abbott and its shareholders in enforcing and prosecuting the rights of the Company and its other shareholders.

CAUSE OF ACTION AGAINST ALL DEFENDANTS

12. Abbott is a fully integrated discoverer, developer, manufacturer, seller and marketer of a wide variety of pharmaceutical, chemical, agricultural and nutritional products. For the fiscal year ended December 31, 1992, the Company earned $1.24 billion on sales of $7.85 billion.

13. Abbott's Ross Laboratories unit is the nation's largest manufacture of baby formula – a blending of milk and vitamins. Last year the Company manufactured and sold

approximately $1.1 billion in baby formula products representing 14% of Abbott's total sales and about 16% of its profits.

14. The Company entered the baby formula business in 1964 when it purchased for $42 million in stock the company now known as Ross Laboratories. Abbott built the baby formula business into a world leader.

15. By 1980, with the threat that the world's largest food company and the leading formula seller outside the United States, Nestle, S.A. ("Nestle"), planned to enter the domestic market, Ross Laboratories' then president, William Smart, devised the idea of an industry ethics code which would, *inter alia*, condemn baby formula advertising. Abbott had long term existing relationships with both medical personnel and hospitals and had little need to advertise its baby formula products. Nestle, on the other hand, as a newcomer to the market, needed to aggressively promote its product if it was to gain acceptance in the United States.

16. According to published reports, in order to further Abbott's relationships, the Company was caused to extend loans, grants, payments for medical articles and trips to various medical conferences to favored students and pediatricians. This conduct was clearly designed to induce physicians to recommend specific products.

17. Moreover, in the early 1980's, Lael F. Johnson, Abbott's general counsel and senior vice president, contacted his counterparts at other formula manufacturers in an effort to encourage a uniform position on a formula ethics code which would bar advertising. At a meeting in September 1983, Mr. Johnson urged the adoption of a non-advertising clause on the Infant Formula Counsel, an industry trade group.

18. While talks progressed on developing a baby formula ethics code which prohibited advertising, the Company and other manufacturers raised formula prices in "lock-step fashion". In fact, on eighteen occasions from 1980 through

the present, Abbott increased the price of its baby formula a total of 207%. This increase represented more than six times the increase in the price of milk during that same period. Milk is the essential ingredient in Abbott's baby formula.

19. Because of lavish contributions made by Abbott and other formula manufacturers, the American Academy of Pediatricians consistently supported positions in favor of opposition to baby formula advertising. Indeed, according to Harry Jenaison, the American Academy of Pediatricians executive director since 1986:

> I did not realize at the time how much we were being bought off. Now that I know the formula companies were trying to manipulate the Academy, I feel absolutely duped.

20. When a responsible Company official attempted to end these practices, which were overt attempts to restrain competition in violation of antitrust laws, he was dismissed. Abbott's President during the late 1980's, Jack W. Schuler, articulated his concerns over Abbott's baby formula sales and marketing practices to Robert A. Schoellhorn, Abbott's then Chairman of the Board and senior executive officer. He reportedly told Mr. Schoellhorn that, "You're going to get caught, either by public outrage or outrage from pediatricians and consumers." For his efforts, Mr. Shuler was fired by Mr. Schoellhorn. Under Abbott's current chairman, defendant Burnham, formula price increases have continued their uninterrupted rise.

21. As a result of the overt attempt to restrain competition and manipulate the price of formula, the Company and two other infant formula manufacturers were sued by the State of Florida in January 1991 for fixing prices. On or about May 24, 1993, it was reported that the Company had agreed to a settlement of that consolidated antitrust litigation in Tallahassee, Florida, for more than $140 million. Despite this huge payment, the Company still faces antitrust actions filed by the Federal Trade Commission ("FTC"), nine state court

actions including seven in California, one in Texas and one in Alabama, relating to baby formula price fixing, and investigations by at least five other states for possible violation of antitrust laws.

22. Moreover, in connection with antitrust and price fixing investigation by the Florida Attorney General's office, there have been serious allegations regarding document destruction and "document purge" orders. Such orders apparently were given after the civil subpoenas had been filed.

23. Furthermore, public disclosure of Abbott's wrongful acts has significantly harmed Abbott's reputation for honesty and integrity, and consequently its ability to maintain existing contracts and obtain future contracts. As Mr. Schuler warned Mr. Schoellhorn, "[i]f it came out that we were rip-off artists, it would have hurt."

24. It is clear that despite numerous "red flags" of wrongdoing in connection with Abbott's baby formula business, including ongoing antitrust investigations by various government agencies, Abbott's Board of Directors and/or its senior executive officers did little or nothing to prevent or effectively stop the Company's price fixing activities.

25. Each defendant had a fundamental fiduciary obligation to implement procedures and safeguards to protect Abbott from the commission of illegal and fraudulent acts by its employees. Instead, the Board inactively permitted or fostered the institutionalization of a policy which virtually insured the fraudulent activities complained of herein would continue unabated. The directors did nothing to detect or prevent the scheme. Indeed, Abbott does not appear to have *any* policy for safeguarding the Company against such fraud.

26. By reason of the foregoing, the director defendants have breached their fiduciary obligations owed to Abbott and its shareholders and are liable therefor.

DEMAND ALLEGATIONS

27. Any demand on the Abbott Board to institute this action would be a futile and useless act for the following reasons:

(a) The Board participated in the wrongful acts at issue, or the wrongful acts at issue are the direct and proximate result of the reckless or grossly negligent failure of the members of the Board to adequately inform themselves as to the Company's affairs and institute adequate systems of internal controls and supervision to detect violations of and/or prevent the Company from violating applicable federal and State law including, but not limited to, the violations of applicable antitrust laws described herein.

(i) For example, as alleged above, the Board was notified that (1) Abbott had taken a central role in erecting illegal barriers to new competitors in the baby formula market by, *inter alia*, actively attempting to prevent advertising of formula; and (2) that such anti-competitive price-fixing activity was illegal.

(ii) Moreover, Abbott's entire Board, including its non-employee directors, knew or should have been aware of, but failed to take adequate steps to prevent or terminate, the rampant illegal price-fixing activity in connection with Abbott's baby formula business because:

(1) Baby formula was one of Abbott's most important and profitable products. For example, it accounted for over a billion dollars in sales (14% of the

Company's total sales) and 16% of the Company's profits last year (1992).

(2) The price of Abbott's baby formula moved in "lock-step fashion" with the price of formula sold by its two major competitors for over ten years, demonstrating the lack of competition in the formula industry;

(3) Mr. Schuler, the Company's otherwise popular President, was unceremoniously fired by the Chairman of the Board, Mr. Schoellhorn, because of his opposition to the Company's anti-competitive activities.

(4) The FTC's deputy director of competition testified before Congress in 1991 that "[t]he antitrust laws prohibit agreements among competitors [in the formula industry] to refrain from advertising, even where the competitors profess laudatory motives such as the public health or safety";

(5) The Justice Department also made it known to the formula industry that an anti-advertising code might well violate antitrust laws; and

(6) Antitrust actions were filed against the Company and its two major competitors in 1991.

(b) The wrongful acts at issue constitute illegal acts and/or violations of the fiduciary duties of the Board, and these acts are thus not subject to the business judgment rule and cannot be ratified;

(c) The director defendants herein, receive or received substantial salaries, bonuses, payments, benefits and other emoluments, as described herein, by virtue of their membership on the Board of Directors of the Company. They have thus benefitted from their wrongs herein alleged and in an effort to preserve their positions of control and the perquisites attendant thereto are incapable of exercising independent objective judgment in deciding whether to bring this action. The Board members also have close personal and business ties with each other and are, consequently, interested parties and cannot in good faith exercise independent business judgment to determine whether to bring this action against themselves; and

(d) To the extent that Abbott presently maintains or previously maintained officers' and director's liability insurance coverage, that insurance would be the primary or principal source of any recovery against the director defendants, and would be rendered void if the Company commenced proceedings against such director defendants, as these policies uniformly contain provisions which void coverage if the Company brings suit in its own name.

WHEREFORE, plaintiffs, on behalf of Abbott, pray for judgment and relief as follows:

A. That the Court declare that the defendants, and each of them, have committed a gross abuse of trust and have breached their fiduciary duties to Abbott and Abbott's shareholders;

B. For compensatory damages in an amount to be proved at trial;

C. For punitive damages where any defendant has been guilty of oppression, fraud or malice;

D. Awarding plaintiffs the costs and disbursements of prosecuting this action, including reasonable attorneys' and experts' fees; and

E. For such other and further relief as may be just and appropriate.

Dated: May 26, 1993

/s/ Illegible

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Local Counsel for Plaintiffs

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

STEVEN ROBINSON, derivatively and on behalf of ABBOTT LABS INCORPORATED, an Illinois corporation,	)	
Plaintiffs,	)	
v.	)	
ABBOTT LABORATORIES INC., an Illinois corporation, DUANE L. BURNHAM, THOMAS R. HODGSON, ROBERT N. BECK, PAUL N. CLARK, GARY P. COUGHLAN, LAEL F. JOHNSON, JOHN G. KRINGEL, DUNCAN J. MCINTYRE, ROBERT PARKINSON, DAVID A. THOMPSON, JOY A. AMUNDSON, KENNETH W. FARMER, THOMAS C. FREYMAN, JOSEPH S. JENCKES, JOHN F. LUSSEN, DAVID V. MILLIGAN, RICHARD H. MOREHEAD, THEODORE A OLSON, DANIEL O. STRUBLE, ELLEN M. WALVOORD, and DON G. WRIGHT, individually and as directors of ABBOTT LABORATORIES, INC.	)	No. 93 CH 5035
Defendants.	)	

DERIVATIVE COMPLAINT

Now Comes the plaintiff, Steven Robinson, derivatively on behalf of Abbott Labs Inc. ("Abbott"), by and through his

attorneys, Holstein, Mack & Klein, and complaining of defendant, states as follows:

1. Plaintiff Steven Robinson, at all times relevant to this complaint, has been a resident of Illinois and a shareholder of Abbott.

2. Abbott is a chemical and pharmaceutical manufacturer and retailer with operations throughout the United States. Abbott is an Illinois corporation and its corporate offices are located in North Chicago, Illinois.

3. Duane L. Burnham, Thomas R. Hodgson, Robert N. Beck, Paul N. Clark, Gary P. Coughlan, Lael F. Johnson, John G. Kringel, Duncan J. Mcintyre, Robert Parkinson, David A. Thompson, Joy A. Amundson, Kenneth W. Farmer, Thomas C. Freyman, Joseph S. Jenckes, John F. Lussen, David V. Milligan, Richard H. Morehead, Theodore A. Olson, Daniel O. Struble, Ellen M. Walvoord, and Don G. Wright, are directors and officers of Abbott.

Facts

4. At some time in 1964, Abbott began manufacturing baby nutrition formulas through its purchase of Ross Laboratories ("Ross"), located in Columbus, Ohio, for $42,000,000 in stock.

5. On information and belief, sales of Abbott's baby formula amount to 1.1 billion dollars annually, representing 14% of its total sales and 16% of its profit.

6. On information and belief, Abbott is responsible for over 50% of total sales in the baby formula industry worldwide.

7. As early as 1980, William Smart, then President of Ross, devised the idea of formulating an industry code which would operate to cease all consumer advertising of baby formula products, in an attempt to hinder outside competitors' abilities to compete in the U.S. market.

8. In so doing, Abbott, along with other industry competitors, in conjunction with controlling approximately 98% of the market, began negotiating an industry-wide code ("code") condemning consumer advertising in the baby formula market.

9. As a result of the continued talks between Abbott and other industry competitors, Lael F. Johnson, then General Counsel and Senior Vice President of Abbott, became concerned with potential anti-trust violations, as a result of the code language. His concerns were forwarded in a memorandum dated September 2, 1983 the Infant Formula Counsel in Chicago, Illinois.

10. In February 1985, as a result of ongoing talks between Abbott and other industry members, the anti-advertising code was approved by the baby formula maker industry.

11. On approximately 18 occasions between the years 1980-1993, Abbott has raised the price of its baby formula by 207% in total. On six of the occasions, the increase was in the consumer price of milk.

12. Sometime in 1991, Abbott was told by then FTC Deputy Director of Competition, Mary Lou Steptoe, that such an anti-advertising agreement between competitors could result anti-trust violations.

13. Thereafter, Abbott and other industry competitors were sued for various anti-trust violations' specifically price-fixing and bid-rigging.

14. As a result of these lawsuits and Abbott's failure to cease violation of Federal Anti-Trust laws, Abbott, on or around May 25, 1993, settled their dispute out of court with various drugstore and foodstore chains for approximately $140,000,000.

15. At the present time, Abbott still faces anti-trust allegations brought last year by the FTC, in addition to state

court lawsuits relating to baby formula price-fixing and other anti-trust violations.

DERIVATIVE COUNT I
BREACH OF FIDUCIARY DUTY – (DUTY OF CARE)

16. Plaintiff adopts and realleges paragraphs 1 through 15 of this complaint as though fully set forth herein.

17. At all times relevant herein, the Directors had a fiduciary duty to the corporation to refrain from engaging in activities which could or would result in anti-trust violations, specifically price-fixing and bid-rigging.

18. That as a result of allegations of anti-trust, specifically the price-fixing and bid-rigging of baby formula products as fully set forth herein, defendants breached their duty of care to the shareholders and the corporation by allowing themselves to get involved in price-fixing and bid-rigging.

19. That as a result of the aforesaid price-fixing and bid-rigging allegations, the shareholders and corporation have been damaged in the amount of $140,000,000 in out-of-court settlements to date, and are likely to incur similar losses in the future as a result of pending litigation in federal and state courts.

20. That plaintiff has made no demand on the Board of Directors to sue, in that the demand to the Board would be a futile gesture because they are interested parties.

WHEREFORE, plaintiff respectfully requests that this court enter an order:

(a) allowing this action to proceed as a derivative action on behalf of plaintiff, derivatively on behalf of Abbott against the directors of Abbott;

(b) awarding attorneys' fees and costs as a result of prosecution of this action; and

(c) awarding any and all relief this court deems just or equitable.

HOLSTEIN, MACK & KLEIN

By: /s/ Robert A. Holstein
Attorney for Plaintiff

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Joseph Seplow,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
K. Frank Austen,	)	
Duane L. Burnham,	)	
H. Laurnce Fuller,	)	No. 93CH 005083
The Lord Hayhoe, P.C.,	)	
Thomas R. Hodgsson,	)	
Boone Powel, Jr.,	)	
David A. Jones,	)	
Allen F. Jackson,	)	
Addison Barry Rand,	)	
W. Ann Reynolds,	)	
William D. Smithburg,	)	
John R. Walter,	)	
William L. Weiss,	)	
and Abbott Laboratories,	)	
Defendants.	)	

COMPLAINT

Plaintiff by his attorneys, Irving Bizar, Roy Martin and Kenneth H. Hanson, for his complaint against defendants alleges:

1. Plaintiff, a resident of New York, New York, is a shareholder of defendant, Abbott Laboratories ("Abbott") and has been such continuously since January 29, 1992, and has been such continuously throughout the wrongs hereinafter alleged, no shareholder having been previously informed of the wrongful activities alleged herein below.

2. Plaintiff brings this action derivitively on behalf of and for the benefit of Abbott.

3. Upon information and belief, Abbott is, and throughout the times hereinafter alleged, was a corporation duly organized and existing under the laws of the State of Illinois with its principle place of business located at One Abbott Park Road, Abbott Park, Illinois. Through itself and subsidiaries it has been mainly engaged in the discovery, and the development manufacture and sale of a broad and sale of a broad and diversified line of human health care products and services, including a broad line of pediatric nutritional. Its products are sold mainly on the prescription or recommendation of physicians or other health care professionals. Its stock is listed and actively traded on the New York Stock Exchange, The Midwest Stock Exchange and The Pacific Stock Exchange.

4. Upon information and belief, the individual defendants are Abbott's Directors and held the offices indicated below during all of the relevant times as follows:

a)

NAMES	DIRECTORSHIP POSITIONS AND OTHER RELATIONSHIPS	YEARS OF SERVICE
K. Frank Austen	Director, Member of Audit Committee.	1983 to Date
Duane L. Burnham	Director, Vice-Chairman of the Board of Directors Elected in 1986, Chief Executive Officer elected in 1989 and Chairman of the Board of Directors in 1990, Chairman of Executive Committee.	1985 to Date

H. Laurnce Fuller	Director, Member of Executive Committee and Compensation Committee.	1988 to Date
The Lord Hayhoe, P.C.	Director, Member of Audit.	1989 to Date
Thomas R. Hodgsson	Director, Elected Executive Vice-President in 1985 and President and Chief Operating Officer in 1990.	1985 to Date
Allen F. Jacobson	Director	April, 1993 to Date
David A. Jones	Director, Member of Compensation Committee.	1982 to Date
Boone Powell, Jr.	Director, Member of Compensation Committee.	1985 to Date
Addison Barry Rand	Director	1992 to Date
W. Ann Reynolds	Director, Member of Audit Committee.	1990 to Date
William Smithburg	Director, Member of Executive Committee.	1982 to Date

John R. Walter	Director, Chairman of Audit Committee and Member of Compensation Committee.	1990 to Date
William L. Weiss	Director, Member of Executive Committee and Member of Audit Committee.	1984 to Date

b) Abbott employees are not compensated for serving on the Board of Board Committees. Non-employee directors are compensated under the Abbott Laboratories Non-Employee Directors Fee Plan. Under this plan, each non-employee director receives $3,750.00 each month for each month of service as a director and $625.00 for each month of service as Chairman of the Board Committee, except that Chairman of the Executive Committee receives $1,600.00 for each month of service. The amounts earned under this plan are paid in cash to the director or deferred as a non-refunded obligation of Abbott or paid into a secular trust established by the Director. Deferred payments are commenced at age 65 or upon retirement from the Board of Directors. If the fees are deferred, the non-employee director may elect to have the fees credited to a phantom stock arrangement under which the fees accrue the same return they would have earned if invested in Abbott common shares. Interest is accrued on the deferred fees but are not credited to the phantom stock arrangement. In 1992, each non-employee director was granted a restricted stock award of 610 shares as adjusted for the 1992 stock. The non-employee directors are entitled to both the shares as adjusted for the 1992 stock. The non-employee directors are entitled to both shares and receive all dividends paid on the shares. In addition, defendant, Austen performed services during 1992 for Abbott under a consulting agreement for which he received $50,000.00 Defendant,

Jones, who is Chairman and Chief Executive Officer of Humana, Inc. – a health care provider – purchased various products from Abbott for approximately $54,500,000.00, at prices, upon information and belief, less than that charged to other purchasers. Defendant, Powell, who is President and Chief Executive Officer of Baylor Health Care System and Baylor University Medical Center – institutions which purchase various products from Abbott at below market prices which totalled $3,800,000.00 in 1992.

5. Upon information and belief, Abbott as a producer of baby formula – Similac formula – together with other producers of baby formula obtained agreements to bar competition in the production of baby formulas and to rig bids for the supplying of such products to various states institutions. Abbott persuaded other manufactures to an industry sale code that would discourage consumer advertising of formula. It was a significant and substantial contributor to the American Academy of Pediatrics to obtain its consent and the consent of its members and to oppose advertisement for the sale of baby formula. And it also paid for doctors, trips to medical meetings to obtain their continued corporation to Abbott's baby products. As a consequence of the foregoing, Abbott was able to carve out a substantial nitch in the baby formula industry and was able to raise the price of the Similac formula by a total of 207% or six times the increase of consumer price of milk, its basic ingredients. By 1992, it was the nation's top maker of baby formula, it was selling $1.1 Billion dollars of baby formula annually or 14% of its total sales and 16% of its profits.

6. Upon information and belief, the practiced violated federal and state anti-trust laws as well as other laws. Abbott concealed these activities and violations by, among other things, a systematic destruction of internal documents at Ross Laboratories, its formula making unit.

7. Upon information and belief, various law suits were filed alleging violations to anti-trust laws and other laws, and investigations by regulatory agencies took place.

8. Upon information and belief, among the law suits filed were suits involving federal anti-trust violations from 27 drug store and food chains claims and the Attorney General of the State of Florida for bid rigging. There suits were consolidated inn the Federal Court located in Tallahassee, Florida. Abbott settled these claims on or about May 24, 1993, for more than $140,000,000.00. The aforesaid settlement does not, however, end Abbott's involvement in other pending law suits and regulatory investigation for the same illegal conduct.

9. Upon information and belief, Abbott has been and will continue to be substantially damaged in this corporate reputation, in the reduction of its net earnings and the expenses it has forced to bear and will continue to bear regarding the activities.

10. Upon information and belief, the aforesaid improper and illegal activities of Abbott were known to, condoned by and acquiesced in and/or authorized by directors. Each member was given the information reflecting the illegal conduct and they made no objections thereto. Indeed, they totally failed to perform their directoral duties and to institute appropriate measures to prevent the aforesaid conduct.

11. Demand has not been made upon the directors of Abbott to bring this action because, upon information and belief, such demand would be futile for the following reasons:

a) The directors directly acquiesced, condoned and authorized the aforesaid illegal conduct;

b) The directors were given knowledge of these activities and failed their directorol duty in not causing these practices to be stopped and in failing to institute appropriate policies to prevent these practices from occurring;

c) The directorial compensation for those directors who deferred payment and adopted phantom stock arrangements would have the stock arrangements increased by the increase in earnings caused by the aforesaid illegal conduct;

d) The directors did not perform any due diligence or otherwise investigate the propriety of Abbott's conduct; and

e) Institution of this action by the present directors placed its conduct in hostile hands and would prevent its effective prosecution.

12. Plaintiff has no adequate remedy of law.

WHEREFORE, plaintiff demands judgment against defendants as follows:

a) Directing all the defendants other than Abbott, jointly and severely to account to Abbott for all of its damages sustained as a result of the illegal conduct alleged herein and the damages sustained by it.

b) Awarding plaintiff the cost and expenses of this action, including reasonable counsel and accountant's fees, and granting such other and further relief as may be just and proper.

Dated: June 2, 1993
Chicago, Illinois

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

BETH MARGOLIS, Plaintiff, v. DUANE L. BURNHAM, LAEL F. JOHNSON, K. FRANK AUSTEN, H. LAURANCE FULLER, SIR BERNARD HAYHOE, THOMAS R. HODGSON, DAVID A. JONES, BOONE POWELL, JR., W. ANN REYNOLDS, WILLIAM D. SMITHBURG, JOHN R. WALTER, WILLIAM L. WEISS, Defendants. -and- ABBOTT LABORATORIES, INC., Nominal Defendant.	)	No. 93 CH 5278

COMPLAINT
DERIVATIVE ACTION

Plaintiff, by her attorney, alleges upon personal knowledge as to her own purchase and ownership of the common stock of Abbott Laboratories ("Abbott" or the "Company") and upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. Plaintiff brings this action as a derivative action on behalf and for the benefit of Abbott. Plaintiff asserts that Abbott's corporate officers and directors breached their fiduciary duties to Abbott by engaging in a price fixing

scheme in its infant formula business. As a result of this scheme, Abbott was subjected to numerous antitrust lawsuits and government investigations and forced to pay over $140 million in settlement of the claims made against it. Abbott continues to face state antitrust actions as well as actions brought by the Federal Trade Commission (the "FTC").

2. The wrongful conduct involved not only one of the most significant businesses at Abbott, representing 14% of the sales and 16% of its profit, but also occurred over a long period of time. Thus, the board of directors of Abbott (the "Board") is charged with a failure to fulfill their fundamental fiduciary obligation to protect Abbott from such harm by: (1) causing and/or allowing Abbott to violate federal and state laws; and (2) failing to take steps after actual or constructive notice of such wrongful acts to correct and/or terminate these wrongful practices. Further the Board has breached their fiduciary duty by failing to adequately supervise and monitor the conduct of Abbott's most senior executives.

3. Plaintiff seeks to recover the damages sustained by Abbott as a result of the defendants' wrongdoing. These defendants – Abbott's senior management and/or directors – were directly involved in the scheme in violation of their duty of care to the Company and its shareholders.

PARTIES

4. Plaintiff purchased on July 27, 1988 and continues to own 400 shares of Abbott common stock.

5. Abbott is named as a nominal defendant in this derivative action. Abbott is one of the largest manufacturers of health care products in the world. Abbott is incorporated in and maintains it principal offices and manufacturing plants in Illinois. Abbott's stock is traded on the New York Stock Exchange and the Company has approximately 835 million shares outstanding, held by over 50,000 stockholders of record.

6. The following defendants are the corporate officers and/or directors of Abbott:

Name	Director Since	Position
K. Frank Austen	1983	Directors and Member Audit Committee and Nominating Committee
Duane L. Burnham	1985	Director and Chairman of the Board and Chief Executive Officer
Thomas R. Hodgson	1985	Director and President and Chief Operating Officer
H. Laurance Fuller	1988	Director and Member Executive Committee and Compensation Committee
Sir Bernard Hayhoe	1989	Director and Member Audit Committee
Lael F. Johnson	N/A	Senior Vice-President, Secretary and General Counsel since 1981
David A. Jones	1982	Director and Member Nominating Committee and Compensation Committee
Boone Powell, Jr.	1985	Director and Member Compensation Committee and Nominating Committee
W. Ann Reynolds	1980	Director and Member Nominating Committee

William D. Smithburg	1982	Director and Member Nominating Committee and Member Compensation Committee (Chairman)
John R. Walter	1990	Director and Member Executive Committee and Member Audit Committee
William L. Weiss	1984	Director and Member Audit Committee

7. The defendants named in ¶ 6 above (the "Individual Defendants"), by reasons of their corporate directorships and/or executive positions, stand in a fiduciary position relative to the Company and the Company's shareholders, which fiduciary relationship, at all times relevant herein, required these defendants to exercise their best judgment and to act in a prudent manner and in the best interests of the Company and the Company's shareholders. They were and are required to: (1) use their ability to control and manage the Company in a fair, just and equitable manner; (2) act in furtherance of the best interests of the Company and its shareholders by refraining from abusing their positions of control; and (3) not to favor their own interests at the expenses of the Company and its shareholders. Additionally, each of the Individual Defendants had the affirmative obligation to be informed of the operations of the Company and to ensure that the Company did not violate the law.

8. Each of the Individual Defendants is sued individually and as a conspirator and aider and abettor, as well as in his/her capacity as an officer and/or director of the Company, and the liability of each arises from the fact that he or she has engaged in all or part of the unlawful acts, plans, schemes or transactions complained of herein.

FACTUAL ALLEGATIONS

9. In 1964, Abbott entered the infant formula market through its purchase of Ross Laboratories ("Ross"). By 1980, Abbott had became the industry leader in the United States.

10. In the early 1980's, Nestle S.A. ("Nestle"), the world's largest food company, intended to enter the American infant formula market. In an effort to exclude Nestle from the marketplace, William Smart, then president of Ross, devised an industry code which would preclude direct advertising to consumers. Because of its extensive network of sales representatives and contacts with hospitals and physicians throughout the United States, Abbott did not need consumer advertising to market its infant formula. Nestle, without such networks and contacts, would not be able to enter the market without consumer advertising.

11. In the early 1980's, Lael F. Johnson ("Johnson"), then general counsel and Senior Vice President of Abbott, contacted his counterparts at Bristol-Myers and American Home Products ("AHP") regarding the industry code and its anti-advertising provision. At the time, Abbott, Bristol-Myers and AHP controlled 98% of the infant formula market.

12. On September 2, 1983, at a meeting of the Infant Formula Council (the "IFC"), Johnson urged the industry code on the IFC members. Steven Kowal, an attorney for the IFC, stated in a memorandum that Johnson was concerned that the code might violate the antitrust laws. The memorandum further stated that Johnson wanted code language which would not "present intolerable antitrust problems."

13. Over the next two years, Abbott, Bristol-Myers and AHP frequently raised the prices of their infant formulas in lock-step fashion. At most times, the prices of the three manufacturers were within a few pennies of each other.

14. In early 1985, executives from Abbott, Bristol-Myers and AHP finalized the language of the industry code. Shortly thereafter, the IFC approved the code.

15. In 1991, Mary Lou Steptoe, deputy director of competition for the FTC, referring to the infant formula industry, testified that the antitrust laws "prohibit agreements among competitors to refrain from advertising." The Justice Department also informed the infant formula industry that its code may violate the antitrust laws.

16. At the same time, the American Academy of Pediatrics (the "AAP") restated its opposition to advertising in the infant formula business. The AAP received $1 million a year from the infant formula manufacturers with Abbott as the largest contributor. A 1986 AAP internal memoranda revealed that the AAP was concerned that it would lose its funding from the infant formula manufacturers if the ban on advertising were removed and a marketing war ensued. According to Harry Jenaison, the American Academy of Pediatricians executive director since 1986:

> I did not realize at the time how much we were being bought off. Now that I know the formula companies were trying to manipulate the Academy, I feel absolutely duped.

17. Abbott's President during the late 1980's, Jack W. Schuler, articulated his concerns over Abbott's baby formula sales and marketing practices to Robert A. Schoellhorn, Abbott's then Chairman of the Board and senior executive officer. He reportedly told Mr. Schoellhorn that, "You're going to get caught, either by public outrage or outrage from pediatricians and consumers." Schuler was removed as President after voicing his concerns and under its current chairman, Defendant Duane L. Burnham, Abbott has continued to raise the price of its infant formula.

18. Finally, in 1988, with its acquisition of Carnation, Nestle was able to enter the United States market. The following year, Bristol-Myers teamed with Gerber to market a Gerber formula. In response, Abbott appealed directly to pediatricians claiming that advertising "undermined [physicians] control over the infant's diet and health."

19. As a result of these practices, Abbott now controls 51% of the U.S. market, Bristol-Myers controls 27% and AHP 11%. Nestle and Gerber control 5% and 3% of the market respectively. As a result of its violations of the antitrust laws, Abbott has been able to raise the price of its infant formula 18 items since 1980 totaling a 207% increase in price over that time.

20. Several suits were then filed against Abbott in early 1991 alleging price-fixing and antitrust violations. Twenty six cases filed primarily by retailers and distributors were consolidated in Federal Court in Florida, the FTC brought one case in Federal Court in Washington, D.C., as well as an administrative action, and nine cases were brought in state courts in California, Texas, and Alabama. In addition, investigations into Abbott's practices are being conducted in California, Connecticut, New York, Pennsylvania and Wisconsin.

21. Some of the actions against Abbott also allege a government bid-rigging scheme in connection with the Women, Infants, and Children ("WIC") program. In four states, Abbott and Bristol-Myers submitted identical bids despite the fact that the bids were sealed. John Kane, then president of Ross, stated in an internal memo regarding bids that competitors "may respond to our strong consistent signal."

22. Abbott later destroyed numerous documents which were responsive to civil subpoenas issued to Abbott by the Florida Attorney General's office. In a July 1988 memo, Charles Himes, Ross' Vice President, advised Ross executives to "be sensitive to what you put in writing." The Ross meeting minutes from that month also "emphasized the need to protect confidential information" Four months later, Himes encouraged Ross officials "to get rid of unnecessary records" and later instructed them to "clean out [their] files before year end."

23. On or about June 12, 1992, the FTC charged Abbott, Bristol-Myers and AHP with government bid-rigging

stemming from the three manufacturer's bids to supply infant formula for a federal program in Puerto Rico. The three bids were within three cents of each other.

24. On May 24, 1993, Abbott settled the actions consolidated in Florida for $140 million. The FTC and state court actions remain pending against Abbott.

25. On or about June 1, 1993, Nestle sued Abbott, Bristol-Myers and the AAP, alleging a conspiracy to exclude competitors from the U.S. infant formula market. Because Nestle was the primary victim of Abbott's price-fixing scheme, Abbott faces a substantial liability to Nestle.

26. Despite numerous "red flags" of wrongdoing in connection with Abbott's baby formula business, including ongoing antitrust investigations by various government agencies, Abbott's Board of Directors and/or its senior executive officers did little or nothing to prevent or effectively stop the Company's price fixing activities.

27. Furthermore, public disclosure of Abbott's wrongful acts has significantly harmed Abbott's reputation for honesty and integrity, and consequently its ability to maintain existing contracts and obtain future contracts.

DERIVATIVE ALLEGATIONS

28. Plaintiff brings this action as a derivative action on behalf of and for the benefit of Abbott to remedy the Individual Defendants' wrongdoing alleged herein.

29. Plaintiff will fairly and adequately represent the interests of Abbott and its shareholders in enforcing and prosecuting the rights of the Company and its other shareholders.

30. Plaintiff has made no demand on the directors of Abbott to institute this action because under these circumstances, such demand would be futile for at least the following reasons:

(a) Because of their participation in the wrongs alleged herein, the Individual Defendants except Johnson (the "Director Defendants") are in no position to prosecute this action. Each of them is in an irreconcilable conflict of interest regarding the prosecution of this action, and cannot exercise the requisite independence necessary to make good faith business judgments. Each of the corporate officers of Abbott participated or acquiesced in the price fixing scheme For example:

(i) The Board was notified that (1) Abbott had taken a central role in erecting barriers to new competitors in the infant formula market by, *inter alia,* actively attempting to prevent advertising of formula; and (2) that such anti-competitive activity was illegal;

(ii) Abbott's Board, including its non-employee directors, knew or should have been aware of, but failed to take adequate steps to prevent or terminate, Abbott's price-fixing activity in connection with its infant formula business because:

(1) Infant formula was one of Abbott's most important and profitable products. For example, it accounted for over a billion dollars in sales (14% of the Company's total sales) and 16% of the Company's profits last year;

(2) The price of Abbott's infant formula moved in "lock-step fashion" with the price of formula sold by its two major competitors for over ten years, demonstrating the lack of competition in the formula industry;

(3) Mr. Schuler, the Company's otherwise popular President, was removed by the

Chairman of the Board, Mr. Schoellhorn, because of his opposition to the Company's anti-competitive activities;

(4) The FTC's deputy director of competition testified before Congress in 1991 that "[t]he antitrust laws prohibit agreements among competitors [in the formula industry] to refrain from advertising, even where the competitors profess laudatory motives such as the public health or safety";

(5) The Justice Department also made it known to the formula industry that an anti-advertising code might well violate antitrust laws; and

(6) Antitrust actions were filed against the Company and its two major competitors in 1991.

(b) The Director Defendants herein, receive or received substantial salaries, bonuses, payments, benefits and other emoluments, by virtue of their membership on the Board. They have thus benefitted from their wrongs alleged herein, and in an effort to preserve their positions of control and the perquisites attendant thereto are incapable of exercising independent objective judgment in deciding whether to bring this action. The Individual Defendants also have close personal and business ties with each other ad are, consequently, interested parties and cannot in good faith exercise independent business judgment to determine whether to bring this action against themselves;

(c) This action names as defendants most of the Board of Directors of Abbott;

(d) The Board of Directors participated or acquiesced in the wrongs alleged herein and approved the acts and omissions to act complained of;

(e) The Individual Defendants have been aware of the wrongs forming the basis of the claims alleged herein, but have chosen not to protect Abbott and have failed to take action with respect to these claims because any such action would require them to sue themselves, their friends and their business associates.

(f) The acts complained of herein constitute violations of fiduciary duties owed by the Board and gross negligence, and thus these acts are incapable of ratification;

(g) In order to bring this suit, the members of the Board would have to sue themselves. They therefore would not be able to vigorously prosecute any action; and

(h) To the extent that Abbott presently maintains or previously maintained officers' and director's liability insurance coverage, that insurance would be the primary or principal source of any recovery against the Individual Defendants, and would be rendered void if the Company commenced proceedings against such defendants, as those policies uniformly contain provisions which void coverage if the Company brings suit in its own name.

DUTIES AND OBLIGATIONS OF INDIVIDUAL DEFENDANTS

31. Each of the Individual Defendants owed to Abbott and its shareholders the duty to exercise due care and diligence in the management and administration of the affairs of Abbott and owed the duty of full and candid disclosure of all material facts related thereto. Further, Abbott's officers and directors owed a duty to Abbott to ensure that the Company operated in compliance with all applicable federal State laws, rules and regulations.

32. To discharge their duties, the Individual Defendants were required to exercise reasonable and prudent supervision over the management, policies, practices, controls and financial affairs of Abbott. By virtue of such duties, and the

obligation of ordinary and reasonable care and diligence, the Individual Defendants were required, among other things:

(a) To manage, conduct, supervise and direct the business and affairs of Abbott in accordance with federal and state law rules and regulations, and the charter and bylaws of Abbott;

(b) To neither violate nor knowingly permit any officer, director or employee of Abbott to violate applicable federal or state laws, rules and regulations;

(c) To ensure the prudence and soundness of policies and practices undertaken or proposed to be undertaken by Abbott to ensure compliance with generally accepted prudent operating standards;

(d) To remain informed how Abbott was, in fact, operating and upon receiving notice or information of any illegal, imprudent or unsound practice, to make a reasonable investigation in connection therewith and to take steps to correct that condition or practice;

(e) To review and supervise major corporate strategies, especially Abbott's marketing practices, to ensure that Abbott's business is prudently managed; and

(f) To preserve and enhance Abbott's reputation as befits a public corporation and to maintain public trust and confidence in Abbott as a prudently managed institution fully capable of meeting its duties and obligations.

WHEREFORE, plaintiff, on behalf of Abbott, prays for judgment and relief as follows:

A. That the Court declare that the Individual Defendants, and each of them, have committed a gross abuse of trust and have breached their fiduciary duties to Abbott and its shareholders;

B. For compensatory damages in an amount to be proved at trial;

C. For punitive damages where any defendant has intentionally violated federal or state law;

D. Awarding plaintiff the costs and disbursements of prosecuting this action, including reasonable attorneys' and experts' fees; and

E. For such other and further relief as may be just and appropriate.

Dated: June 9, 1993

/s/ Marvin A. Miller
Marvin A. Miller

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